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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

In re PRESCILLA S. et al., Persons
Coming Under the Juvenile Court Law.

B172925; B173922

LOS ANGELES COUNTY
DEPARTMENT OF CHILDREN
AND FAMILY SERVICES,

(Los Angeles County
Super. Ct. No. CK46877)

Plaintiff and Respondent,

v.

CHRISTOPHER O. and LISA S.,

Defendants and Appellants.

APPEALS from a judgment and orders of the Superior Court of Los Angeles County, Sherri S. Sobel, Referee. Affirmed as to father's appeal. Reversed and remanded with directions as to mother's appeal.

Marsha Faith Levine, under appointment by the Court of Appeal, for Defendant and Appellant Christopher O.

Andre F. F. Toscano, under appointment by the Court of Appeal, for Defendant and Appellant Lisa S.

Larry Cory, Assistant County Counsel, and Jacklyn K. Louie, Deputy County

Counsel, for Plaintiff and Respondent.

INTRODUCTION

In these consolidated appeals, two parents of dependent children appeal from orders terminating parental rights in a juvenile dependency proceeding.

In the mother's appeal, we conclude that no denial of the mother's due process rights occurred in the Welfare and Institutions Code section 366.26¹ hearing and that substantial evidence supports the juvenile court's determination that the section 366.26, subdivision (c)(1)(A) exception to termination of parental rights did not apply. Because the juvenile court and the Department of Children and Family Services ("DCFS") had notice that the children might be subject to the Indian Child Welfare Act ("ICWA") and did not comply with ICWA notice procedures, the matter must be remanded for compliance with ICWA notice provisions, with directions to the juvenile court regarding proper procedures after such notice is effectuated.

In his appeal, the father claims that appointed counsel failed to represent him and provided ineffective assistance. The father's failure to file timely appeals from prior appealable orders, however, waives this claim. Moreover, the father seeks reversal based on appointed counsel's lack of representation and ineffective assistance so as to assert his mother's right to relative preference as a prospective adoptive parent, but he lacks standing to appeal a relative placement issue.

The appeals lack merit, but we reverse the judgment and remand for compliance with ICWA notice requirements, with directions to the juvenile court contingent on the result of that ICWA notice.

PROCEDURAL AND FACTUAL HISTORY

On November 7, 2001, the DCFS detained Prescilla S., born June 2000, to Lisa S. ("Mother") and to a father later identified as Christopher O., and Andrew F., born August

¹ Unless otherwise specified, statutes in this opinion will refer to the Welfare and Institutions Code.

2001, to Mother and to Efren F. The DCFS detained the children because of domestic violence between Mother and Efren F. and Efren F.'s history of arrests and convictions for violent crimes. At the November 13, 2001, detention hearing, Efren F.'s attorney stated that the maternal grandmother appeared to have Indian ancestry but could not identify the tribe. The juvenile court stated that it would appoint an expert when Mother provided further information. The juvenile court found that a prima facie case for detaining the children was established, ordered them detained, found the ICWA did not apply, and ordered family reunification services for Mother and for Efren F. The trial court ordered twice weekly monitored visits for Mother when she was released from custody in Los Padrinos Juvenile Hall.

Mother turned 18 years old in November 2001. As a minor, she received services from the Juvenile Probation Department and had arrests for possessing a controlled substance, giving false information to a peace officer, and for being a runaway. Prescilla's father, Christopher O., appeared at a December 5, 2001, hearing in which the juvenile court appointed Tim Turner counsel for Christopher O. Christopher O. was in prison at the California Correctional Institute in Tehachapi. His criminal history since 1996 included a felony conviction for possessing a controlled substance while armed and convictions for other felonies and misdemeanors. For Mother and Efren F., the juvenile court sustained a first amended petition filed December 5, 2001, as to section 300, subdivision (b), ordered reunification services, placement of the children as close to them as possible, and twice-weekly monitored visits. For Christopher O., the juvenile court set a January 30, 2002, hearing on paternity, jurisdiction, and disposition issues.

Mother acknowledged Christopher O. was Prescilla's father. Christopher O. wanted to attend the January 30, 2002, hearing, but had no relationship with Prescilla because during her life he was incarcerated for violating parole by possessing a firearm. He acknowledged a criminal history for drug-related offenses. Christopher O.'s written response gave his release date as April 14, 2002.

Christopher O. and Attorney Turner appeared at a January 30, 2002, hearing. The juvenile court found Christopher O. the declared father of Prescilla and sustained the December 5, 2001, petition as to him. Christopher O. said he had been in custody since the fifth day of Prescilla's life, admitted he had been in custody twice for drug-related offenses and twice for violent offenses, but wanted to be part of Prescilla's life. The juvenile court ordered Christopher O. to participate in a drug rehabilitation program, random drug testing, individual counseling, and a parenting class, and ordered twice weekly monitored visits.

For a March 6, 2002, progress hearing, the DCFS reported that the children were placed in the foster home of Asuncion R. In February, Christopher O. told a children's social worker (CSW) he would appear at a March 6, 2002, hearing, but did not provide his address or a phone number. He asked that Mother be present during his first visits, as Prescilla did not know him. He had no place to live, but he said his parole officer would help him locate a housing program that would include drug testing and a drug program. The CSW left phone messages for Christopher O. on February 15, 19, and 25, 2002, but as of February 27, 2002, Christopher O. had not contacted the CSW. His parole officer, Gary Howell, said Christopher O. was homeless and did not want to live in the housing program Howell arranged for him. Christopher O. had to report to Howell every Monday and an arrest warrant would be issued if he did not comply. Howell stated Christopher O. had been in trouble with the police and had "a lot of problems," and although he had good intentions about reuniting with Prescilla and complying with court orders, he was "going the wrong way." After several attempts to locate Christopher O. so he could comply with his court-ordered programs and begin visiting with Prescilla, the CSW initiated a due diligence on February 26, 2002.

On March 6, 2002, the juvenile court found Mother and Efren F. complied with court orders and gave the DCFS discretion to increase visitation.

For the June 5, 2002, six-month review, Andrew F. and Prescilla S. continued placed in a foster home. Lisa S. and Efren F. had moved three times and were employed.

Lisa S. was pregnant with a third child. Lisa S. and Efren F. had monitored visits with Prescilla and Andrew two or three times a week; the foster mother reported no problems associated with visits. Christopher O. had no contact with the CSW, had not tried to visit Prescilla, and had not complied with court orders. Since February 19, 2002, Christopher O. had no contact with his parole officer, who considered him to be at large and subject to incarceration if he had committed crimes.

At a June 5, 2002, six-month review hearing, Attorney Turner appeared for Christopher O., who was not present. The juvenile court ordered family reunification services for Mother and Efren S. and made visitation orders. The juvenile court ordered family reunification services terminated for Christopher O. and set a permanent placement hearing for December 4, 2002.

For the December 4, 2002, hearing, the DCFS reported that Mother reported to police that Efren F. stole \$100 from her. Efren F. was arrested and found guilty of possessing a firearm and violating a special condition of no gang association. When Efren F.'s family confronted Mother for calling the police, she moved out of their home. Mother and Efren F. were still a couple, but he lived with his parents and Mother lived with a friend. Lacking appropriate housing, the parents could not have overnight visitation, but had unmonitored day visits. In this period, Christopher O. had not contacted the CSW and had not tried to visit with Prescilla S.

At the December 4, 2002, hearing, Attorney Turner appeared for Christopher O., who was not present. The juvenile court ordered Mother and Efren F. to take a domestic violence group counseling and individual counseling and modified visitation orders as to them. The juvenile court set a section 366.22 hearing for June 4, 2003.

For the June 4, 2003, hearing, the DCFS reported that Prescilla S. and Andrew F. continued stable and successful placement in a licensed foster home where they had lived for more than a year, had bonded with their foster family, and appeared emotionally and physically attached. The foster mother responded appropriately to their needs. Mother was comfortable with the children's placement with this foster family and felt the foster

mother had done a good job caring for and raising the children. Mother was six months pregnant, employed, and was enrolled in a domestic violence batterer's program but had attended only 10 of 52 sessions. The program leader said she needed help identifying issues of accountability and continued to externalize problems. Mother tested positive for marijuana, and failed to drug test on four occasions between April 15 and May 2, 2003. Mother drug tested positive for amphetamines, "methamphetamine [*sic*], marijuana," and cocaine on April 1 and April 23, 2003. Mother tested negative on May 13 and May 23, 2003. Mother enrolled in individual counseling, attended all scheduled sessions, and appeared motivated to improve her situation.

Efren F. was arrested on February 19, 2003, for corporal injury on a spouse, but was released after Mother appeared in court and did not press charges, claiming Efren F. never assaulted her, as previously reported. Efren F. continued on parole.

On February 6, 2003, CSW informed Efren F. and Mother that the reunification period would end soon and adoption was the identified permanent plan. An adoption assessment identified the foster mother and paternal grandmother as prospective adoptive parents of Andrew and identified the foster mother as Prescilla's prospective adoptive parent. The paternal grandmother said she could not care for both children. The foster mother repeatedly told the CSW she was willing to adopt both children. On March 18, 2003, Christopher O.'s mother, Melody O., informed the CSW she believed Prescilla was her granddaughter and was willing to pursue adoption.

Mother and Efren F. had not complied with the order to participate separately in a group domestic violence program and in individual counseling. Christopher O. had not contacted the CSW or attempted to visit Prescilla.

On May 29, 2003, Mother told the CSW she did not want Andrew or Prescilla placed in the paternal grandmother's home. Mother felt that the foster mother was nice to the children, the children were attached to the foster mother, and if the children were adopted Mother wanted the foster mother to adopt them. In this period Efren F. assaulted Mother several times, most recently on February 18, 2003, but Mother would not press

charges. Other incidents between Mother and Efren F. involved violence and drugs. The CSW observed that Mother minimized Efren F.'s assaults on her.

Because the domestic violence that brought Andrew and Prescilla to the juvenile court's attention still existed, because Efren F. and Mother had a history of domestic violence and failed to participate in programs to provide a stable, safe home, and because placing Andrew F. with his paternal grandmother would expose him to a violent and dangerous environment and separate him from Prescilla, the CSW recommended declaring the children a sibling group for adoption together. The CSW recommended setting a section 366.26 hearing to address adoption as the permanent plan.

On June 4, 2003, Attorney Turner appeared on behalf of Christopher O., who did not appear. The juvenile court found the children were a bonded sibling group and should not be moved from their current placement without court order; ordered a DCFS-approved monitor for visitation, ordered the parents not to visit together, and ordered the DCFS to initiate due diligence to locate Christopher O. and Efren F. The juvenile court continued the matter for a contested hearing on July 17, 2003.

On June 23, 2003, the DCFS filed a section 342 petition based on Mother's positive drug tests. At a June 24, 2003, hearing, Christopher O. did not appear, but was represented by Attorney Turner. The matter was continued for an adjudication hearing on July 17, 2003.

On July 17, 2003, DCFS reported that as of June 24, 2003, Mother's case manager stated Mother random tested negative for drugs.

Christopher O. was incarcerated in the City of Orange, awaiting sentencing for attempted murder. From Christopher O., the CSW had received no information and the juvenile court received no waiver. The CSW arranged transportation of Christopher O. to the July 17, 2003, hearing, for which he was noticed and ordered to appear. The DCFS recommended adoption as the permanent plan.

At the July 17, 2003, hearing, Robert Flores specially appeared on behalf of Attorney Turner, representing Christopher O., who did not appear. The juvenile court

sustained the section 342 petition. The juvenile court found Mother and Efren F. did not comply with their case plan and the children could not be returned to the parents' custody and there existed no substantial probability the children would be returned within six months, ordered termination of family reunification services, and set a section 366.26 hearing for November 13, 2003.

On October 21, 2003, Mother filed a section 388 petition, which (1) asserted Prescilla S.'s possible Indian ancestry and (2) sought modification of the order placing the children for adoption and terminating Mother's parental rights. The trial court set a November 13, 2003, hearing on the petition.

The DCFS report for the November 13, 2003, hearing stated that Prescilla S. and Andrew F. identified foster parents as "papi" and "mami," or "mom and dad." Prescilla S. said she liked living with the foster parents; Andrew F. did not understand the CSW's question. The children hugged and kissed the foster family, who responded the same way. In an October 22, 2003, phone conversation, Mother told a CSW she had filed a section 388 petition and sought liberalized visits ordered by the juvenile court on July 17, 2003, after 120 days of sobriety. The CSW responded that 120 days became effective on November 13, 2003, so visitation could not be liberalized yet.

The foster mother reported that Mother and Efren F. and their newborn child went to the foster parents' house on October 31, 2003. During a 45-minute visit, Efren F. was attentive to his newborn child, Mother was more attentive to Prescilla, and neither Efren F. nor Mother made much effort to communicate with Andrew S.

Mother decreased her visits with the children in the previous four months. She blamed this on a bus strike, although visits had decreased before the bus strike began, and there were other alternatives to bus transportation. Mother's telephone calls had also become fewer. The DCFS observed that since the family came to its attention, Mother was involved in several serious domestic disputes with Efren F., which placed her and the children at risk. Mother minimized incidents in which Efren F. assaulted her. These incidents showed that the parents were not responsible for their actions and liberalizing

visitation or returning custody of the children to the parents would place the children at risk. Mother failed to complete several court-ordered programs. The domestic violence that brought the family to the DCFS's attention continued to exist. Mother was dishonest with the CSW on several occasions and minimized disputes with Efren F. The DCFS reported Mother was unemployed and struggling financially, making it difficult for her to support herself, her third newborn child, and Andrew and Prescilla.

The DCFS report for the November 13, 2003, hearing stated that Mother visited the children weekly in the foster mother's home for two hours or sometimes a bit more. Mother's visits with and phone calls to the children had become irregular since she was 7 or 8 months pregnant with her latest child, born September 2003. Mother's irregular visits continued after that birth. In the latest period, the foster mother reported that Mother visited regularly but minimized the visits. Christopher O. had, and sought, no visitation or telephonic communication with Prescilla S. because of his incarceration. Prescilla had "on and off biweekly monitored visitation" with Melody O., her paternal grandmother, but on October 8, 2003, the foster agency social worker reported that Prescilla refused to stay for visits with Melody O.

The CSW reported that the foster family appeared highly motivated and committed to adopting Andrew F. and Prescilla S., and the foster family stated they would complete any process to have the children legally adopted. The CSW felt that the foster family's adoption of Andrew and Prescilla was appropriate because the foster family had raised them for one year and nine months and provided a stable home, and because the two children would stay together. The CSW called the children's relationship with their foster parents "excellent and stable" and stated that the foster parents had raised the children as their own. The children referred to the foster parents as mom and dad and were attached to and showed affection for them. The adoption home study was completed and approved.

Attached to the report was Christopher O.'s letter to the court, stating that he did not have proper representation and that Robert Flores was representing him without his

consent and had not responded to Christopher O.'s efforts to contact him. The letter stated that Flores made statements inconsistent with Christopher O.'s wishes regarding Prescilla. The letter stated that Christopher O. had contact with Prescilla several times in March and April of 2002 and called the foster home and spoke with Prescilla on several occasions. The letter stated that Christopher O.'s mother had developed a relationship with Prescilla, and asked that she be permitted to adopt Prescilla.

In the November 13, 2003, hearing, Mother withdrew her section 388 petition and the matter was set for a contested section 366.26 hearing on December 29, 2003. The court ordered Attorney Roberto Flores to make contact with Christopher O. so as to be able to answer whether he did or did not waive his appearance.

Mother filed a second section 388 petition on December 23, 2003, asserting that Prescilla S. might be of Indian ancestry and seeking return of her children to her custody. The juvenile court set a hearing for December 29, 2003.

At the December 29, 2003, hearing, attorney Flores had no waiver on behalf of Christopher O., who desired to be present and requested a continuance. The juvenile court continued the section 366.26 contested hearing to January 26, 2004, for Christopher O. to be present or for receipt of his waiver.

In Mother's section 388 hearing, Kellie Chandler, a case manager in the Shields Family Healthy Start Program for pregnant and postpartum young women, testified that Mother enrolled as a client in the program in June 2003. Chandler had daily contact with Mother, who lived in the Shields housing program. Chandler knew that domestic violence between Efren F. and Mother initiated the DCFS case, and stated that such incidents had occurred at the Shields facility. Mother attended a domestic violence program and classes in life skills, drug and alcohol education, "Mommy-and-Me," parenting, and participated in group and individual therapy. She had random tested for drugs two or three times a week since June 2003, and tested clean. Mother participated fully in programs Shields offered her. Mother's visits with her children did not take place at the Shields facility. In July 2003, Chandler requested that Mother visit her children at

the Shields facility, but the case worker responded that Mother needed more time in the Shields program.

Mother testified that although Efren F. was the father of her three-month-old baby, Mother was in the process of getting a divorce because she wanted Andrew and Prescilla back. She intended to obtain a restraining order the next day. Since May 2003 Mother had been in the Shields domestic violence program. Mother had visited Prescilla and Andrew during 2003 for an hour once a week. This was reduced visitation, but Mother did not know why the duration of her visitation was reduced. She missed visits with the two children during the bus strike and after she just had her third child, but testified that otherwise she had regular visits. Mother had a home through the Shields program, where she was permitted to have her children if the juvenile court allowed that. Mother worked full-time, and testified that she earned sufficient income to support herself and three children. The juvenile court also admitted into evidence three DCFS reports dated November 13, 2003, and attachments, and a DCFS status review report dated June 4, 2003.

The juvenile court found that the proposed change of order would not promote the children's best interest and denied Mother's section petition. The court ordered the DCFS to submit Christopher O.'s signed waiver if he did not wish to attend the January 26, 2004, hearing, or to submit a local jail removal order.

Christopher O. did not appear at the January 26, 2004, hearing. The juvenile court referred to an erroneous listing of Attorney Flores as attorney for Christopher O. Although Attorney Turner was at all times Christopher O.'s attorney, the court relieved Turner and appointed Flores, since Christopher O. believed Flores was his attorney. The juvenile court gave Flores 30 days to contact Christopher O., set the matter for Christopher O.'s and Mother's contested section 366.26 hearing, and continued the matter to February 24, 2004.

On January 30, 2004, Christopher O. filed a notice of appeal from the January 26, 2004, order, in Appeal No. B172925.

The juvenile court trailed the matter to February 25, 2004, when Christopher O. was present in custody. The court received DCFS reports and court information documents into evidence and heard testimony.

Mother's testimony: Mother provided primary care before the DCFS detained Andrew at age two months and Prescilla at one year. Mother testified that in June 2003, she had approximately 10 overnight visits with the children in the foster parents' home that DCFS reports did not reflect. Mother did not want to get the foster mother in trouble or have the children taken from her, so Mother notified the CSW only of a couple of those overnight visits. In these visits, she played with Andrew and Prescilla and bathed them. She slept in the same room with Prescilla, and in the morning she combed her hair, washed her face, dressed her, and cared for her and Andrew. When the two children saw her arrive for a visit, they were happy and became excited and hyperactive. Andrew especially ran back and forth. Andrew and Prescilla refer to Mother as "Mom" and "Mother." Mother also testified about overnight visits which the DCFS knew about at the home of the children's paternal grandmother, Maria F. Although still married to Efren F., Mother had a March 5, 2004, court date for a divorce and a restraining order. Mother testified she believed termination of her parental rights would be detrimental to Andrew and Prescilla, because they were attached to Mother and to their five-month-old sister. Based on their reactions when they saw her or talked to her on the telephone, Mother believed that Prescilla and Andrew saw her as their mother.

Christopher O.'s testimony: Christopher O. testified that although he did not want his daughter to live with someone other than her true family, he admitted that he had been incarcerated for two years and during that time had not seen his daughter.

Asuncion R.'s testimony: Asuncion R., the children's foster mother, testified that Mother had spent one night in her home with the children in June 2003. Mother slept on the living room sofa; the children slept in their room. Mother spent the night because she had been living with a friend, who would not let her into the house because Mother had not paid the rent. Asuncion R. testified that Mother was untruthful when stating that she

had 10 overnight visits in Asuncion R.'s house. Asuncion R. testified that the two children call her "mother" and call her husband "father."

Rosio R.'s testimony: Rosio R. lived with her mother, Asuncion R., and Prescilla and Andrew. She testified Mother spent only one night in the home. Rosio R. arrived home late from work. Mother slept on the couch.

The juvenile court's ruling: The juvenile court found no compelling evidence that the section 366.26, subdivision (c)(1)(A) exception applied. Given the children's ages when they were detained and their present ages, the children's relationships with the parents, and the conduct of the parents, the juvenile court found that none of the three parents could satisfy this exception. The juvenile court found that Christopher O. had been in custody throughout the case, notice to him was satisfactory, and he was never in a position to have custody of Prescilla. The children lived in the same home for 26 months and were nearly four and three years old, respectively. The evidence did not show that the subdivision (c)(1)(A) exception was satisfied. By clear and convincing evidence the juvenile court found that the children were adoptable and there were no exceptions, and terminated parental rights as to Prescilla S. and Andrew F.

Mother filed a timely notice of appeal on February 25, 2004, Appeal No. B173922. Christopher O. filed a timely notice of appeal on March 12, 2004, also Appeal No. B173922. On May 18, 2004, this court ordered these appeals consolidated as Appeal No. B172925.

ISSUES

Mother claims on appeal that:

1. Because the DCFS did not comply with ICWA notice requirements, the order terminating parental rights must be reversed and if the children are found to be Indian children, all prior orders must be vacated; and
2. The juvenile court denied Mother's due process right to be heard and to present evidence at the section 366.26 hearing, depriving her of the opportunity to establish the section 366.26, subdivision (c)(1)(A) exception to termination of parental rights.

Christopher O. claims on appeal that:

1. Christopher O. was denied meaningful access to the courts because counsel failed to communicate with him and to represent his interests, and because it was not clear which attorney represented him; and
2. Because of “structural” error, Christopher O. does not need to establish prejudice.

DISCUSSION

I. Mother’s Appeal

A. Mother Has Not Shown a Violation of Her Due Process

Rights in the Section 366.26 Hearing

Mother claims the juvenile court denied her due process right to present evidence of significant probative value that would have compelled application of the exception to termination of parental rights in section 366.26, subdivision (c)(1)(A).

1. The Section 366.26, Subdivision (c)(1)(A) Exception

Pursuant to section 366.26, subdivision (c)(1), if the juvenile court determines “that it is likely the child will be adopted, the court shall terminate parental rights and order the child placed for adoption.” This statute further states that “[a] finding under subdivision (b) or paragraph (1) of subdivision (e) of Section 361.5 that reunification services shall not be offered . . . shall constitute a sufficient basis for termination of parental rights unless the court finds a compelling reason for determining that termination would be detrimental to the child due to one or more of the following circumstances:

“(A) The parents or guardians have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship.”

Thus the section 366.26, subdivision (c)(1)(A) exception requires a showing of both prongs, i.e., a showing that (1) the parent has “maintained regular visitation and contact with the child” and (2) that the child would benefit from continuing from the relationship. (*In re Angel B.* (2002) 97 Cal.App.4th 454, 466.) After a parent has failed to reunify and the juvenile court has found the child likely to be adopted, the parent has

the burden of showing that (1) termination would be detrimental to the child under this statutory exception, or (2) continuing the parent-child relationship would promote the child's well-being to such a degree as to outweigh the well-being the child would gain in a permanent home with new, adoptive parents. (*Ibid.*; *In re Derek W.* (1999) 73 Cal.App.4th 823, 826.)

The juvenile court determines whether a parent has established the section 366.26, subdivision (c)(1)(A) exception by balancing "the strength and quality of the natural parent/child relationship in a tenuous placement against the security and the sense of belonging a new family would confer. If severing the natural parent/child relationship would deprive the child of a substantial, positive emotional attachment such that the child would be greatly harmed, the preference for adoption is overcome and the natural parent's rights are not terminated." (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 575.) "[T]he juvenile court must engage in a balancing test, juxtaposing the quality of the relationship and the detriment involved in terminating it against the potential benefit of an adoptive family." (*In re Clifton B.* (2000) 81 Cal.App.4th 415, 424-425.) This court reviews the juvenile court's determination by the substantial evidence test. (*In re Autumn H.*, *supra*, at pp. 575-576.)

2. Mother's Due Process Claims

Mother claims that in the February 25, 2004, section 366.26 hearing, the juvenile court (1) precluded her from putting on her case and (2) erroneously relied on evidence not presented at the December 29, 2003, section 388 hearing.

a. The Juvenile Court Did Not Preclude Mother From Presenting Her Case

Mother claims that the trial court did not permit her to present evidence as to the number and quality of her visits with Prescilla and Andrew. Mother claims that error arose from the juvenile court judge's statement that Mother's section 388 petition was previously denied and that the issue before the court on February 25, 2004, was the

exception to termination of parental rights. Mother does not explain why these accurate statements give rise to error.

Mother also argues that the juvenile court would not allow Mother to answer questions related to the children's bond with her. The juvenile court sustained an objection on relevance grounds to a question asking Mother whether she provided primary care for Prescilla and Andrew before they were detained. After some discussion, however, the juvenile court stated that for the period from the birth of Prescilla and her detention at one year of age and from the birth of Andrew and his detention at two months of age, the court was satisfied that Mother provided primary care. Thus juvenile court accepted as fact the testimony that counsel's question attempted to elicit from Mother. We see no error.

Mother claims that DCFS reports only briefly addressed Mother's visits and did not address the children's relationship with Mother. Mother cites reports of December 5, 2001, January 1, 2002, and March 6, 2002, as not addressing Mother's visits with the children. Mother, however, did not call these shortcomings to the juvenile court's attention and did not produce evidence of visitation omitted from these reports.

The latest reports show diminished and inconsistent visitation by Mother. The June 4, 2003, report states that because the parents were involved in incidents that placed the children at risk and had not complied with court orders, visits were monitored by an agency social worker and scheduled for once a week for an hour. The November 13, 2003, interim review report stated that Mother decreased her visits with the children in the past four months. Mother claimed this was because of the bus strike, although the CSW noted that visits decreased before the bus strike began and before Mother gave birth to her third child in early September 2003.

The court admitted into evidence a DCFS section 366.26 report dated November 13, 2003, information for the court officer dated January 26, 2004, and information to the court officer of February 25, 2004. Regarding visitation, the section 366.26 report stated that Mother had weekly visits with the children in the foster mother's

home for two hours and sometimes a bit more. The foster mother reported that Mother had been “on and off with her visitation” and telephone calls since Mother was seven or eight months pregnant with her child born in September 2003. The foster mother reported that Mother continued not visiting on a regular basis.

Mother’s case-in-chief consisted of Mother’s testimony. Mother requested no other documentary evidence be admitted into evidence. During Mother’s testimony, Mother’s counsel affirmed that she sought to elicit testimony about Mother’s visits which the DCFS did not include in its reports. The juvenile court judge asked Mother how frequently, during the previous 26 months, she had spent overnight visits with the children. Mother responded that she had approximately 10 overnight visits with the children in the foster mother’s home around June of 2003. Mother testified that the DCFS reports did not reflect those visits. Mother stated that she notified the CSW of a couple of her one-night visits in the foster mother’s home, but did not report all of them because Mother did not want to get the foster mother in trouble and did not want to have Prescilla and Andrew taken away from the foster mother. Mother testified that since the previous hearing on December 29, 2003, she had one visit a week with the children, at the agency. The juvenile court sustained relevance objections to questions asking the name of Mother’s third, five-month-old child, asking whether Prescilla and Andrew met that child, and asking whether Mother’s five-month-old accompanied her on her overnight visits to the foster mother’s home. The juvenile court rejected these questions because they were not relevant to the section 366.26, subdivision (c)(1)(A) exception, and as Mother’s counsel conceded, Mother was not trying to establish a subdivision (c)(1)(E) exception (substantial interference with a child’s sibling relationship). Mother’s counsel then elicited Mother’s testimony describing the interaction she had with her children on the overnight visits with them at the foster mother’s house, Mother’s description of how the children reacted to Mother’s visits, and what Andrew and Prescilla called Mother. Although the juvenile court granted a motion to strike Mother’s testimony that she used to have overnight visits with Andrew and

Prescilla at her mother-in-law's house, Mother testified that the DCFS was aware of those overnight visits. Opposing counsel objected to a question about whether the DCFS accurately reported those visits, and the trial court stated that Mother's testimony should be limited to events occurring after the December 29, 2003, hearing, unless there was additional evidence which was now known but which was not known at the December 29, 2003, hearing, having to do with the subdivision (c)(1)(A) exception.

Mother failed to make a timely objection in the juvenile court to a ruling which prevented her from presenting evidence. Mother did not make an offer of proof regarding evidence of visitation purportedly omitted from DCFS reports. The juvenile court did not prevent Mother from providing evidence of overnight visits in the foster parents' home. We find no denial of due process.

*b. Mother Has Not Shown Error in the Juvenile
Court's Evidentiary Rulings*

Mother argues that the juvenile court erroneously relied on evidence which was not presented at the December 29, 2003, section 388 hearing. This appears to an argument that the evidence in the section 388 hearing was incompatible with Mother's burden of proof at the section 366.26 hearing.

On July 17, 2003, the juvenile court ordered family reunification services terminated and set a section 366.26 hearing for November 13, 2003. On November 13, 2003, Mother set the section 366.26 hearing for contest. Mother's section 388 petition filed December 23, 2003, incorrectly identified the orders Mother sought to modify or set aside as orders placing the children for adoption and terminating her parental rights. No such orders had been entered. In the hearing on the section 388 petition on December 29, 2003, the juvenile court received into evidence an interim report, a section 366.26 report, and an information for court officer report dated November 13, 2003, and a DCFS status review report dated June 4, 2003, and heard testimony from Mother and from Mother's case manager at a Shields Family Healthy Start Program for pregnant and postpartum young women.

Mother argues that the issues in the section 388 petition hearing had no bearing on Mother's burden of proof regarding the section (c)(1)(A) exception in the section 366.26 hearing. The evidence in the section 388 petition hearing, however, did address Mother's visitation with Prescilla and Andrew in the previous year. Mother testified that at some unspecified date during the previous year she began to visit for shorter periods than previously, testified that she missed visits during the bus strike and when she gave birth to her third child, and asserted that she visited regularly other than those occasions. We reject the argument that the testimony in the section 388 hearing had no bearing on mother's burden of proof in attempting to make the showing necessary for the subdivision (c)(1)(A) exception in the section 366.26 hearing.

Mother also argues that the juvenile court relied on evidence not presented at the section 388 hearing, which denied Mother's due process right to present evidence of the children's beneficial relationship with her. In the section 366.26 hearing, Mother cites the trial court's sustaining of objections to three questions asked by Mother's counsel which referred to Mother's third, five-month-old child. The trial court sustained objections to questions about the name of the five-month-old child, whether Andrew and Prescilla had met that five-month-old child, and whether the five-month-old child accompanied Mother when she had her overnight visits with the foster mother. Although Mother's attorney referred to the issue of "the bond [Mother] has with [the] child," which was not explored in the section 388 hearing, the juvenile court asked if this referred to the five-month-old child. Mother's attorney stated that she was not asking Mother about her bond with the five-month-old child. The juvenile court, however, correctly stated: "You were. You keep bringing up the fact that she takes the five-month-old with her, which has no relevance at all. There is no (c)(1)(E) exception here." Mother's counsel conceded the subdivision (c)(1)(E) exception was not an issue. The juvenile court's sustaining of relevance objections to questions about Mother's five-month-old child were not an abuse of discretion. Mother's five-month-old child was not detained and was not subject to juvenile court jurisdiction. The sustaining of objections to this questioning did

not deny Mother's due process. The record, moreover, shows no evidence that the juvenile court erroneously believed that Mother's bond with the children was addressed in the section 388 hearing. That issue was part of Mother's burden in the section 366.26 hearing.

Mother appears to argue that the juvenile court allowed Mother to present evidence relating only to overnight visits at the foster parents' home or visits occurring after the section 388 hearing on December 29, 2003. With regard to Mother's evidence in the section 366.26 hearing to support her claim that the subdivision (c)(1)(A) exception existed, the juvenile court stated that the evidence concerned the period since the December 29, 2003, section 388 hearing, "[u]nless there's something you didn't know that you would like to amend, having to do with the (c)(1)(A) exception. You can explore that fully. So if there's information that was not provided at the 388 hearing because you didn't know it and you know it now, go ahead. But be real specific as to when you're talking about." Mother's juvenile court counsel made no objection that the court's ruling prevented Mother from presenting evidence relevant to her case. Mother's briefing on appeal does not specify the evidence relevant to this issue the ruling prevented Mother from placing before the juvenile court. We find no error.

*c. Mother Has Not Established the Section 366.26,
Subdivision (c)(1)(A) Exception*

As stated, to satisfy the subdivision (c)(1)(A) exception, Mother has the burden of providing evidence that Mother (1) maintained regular visitation and contact with the children, and (2) the children would benefit from continuing the relationship.

We review whether substantial evidence supports the juvenile court's determination that the exception did not apply.

*(i) The Maintenance of Regular Visitation
and Contact Requirement*

As to the first requirement of the section 366.26, subdivision (c)(1)(A) exception, the maintenance of regular visitation and contact with the children, Mother's claim in the

juvenile court was that Mother had visits with the children which were not included in the DCFS reports. Mother testified only that for a month or two in June of 2003, she spent a night at the foster mother's home visiting the children on approximately 10 different occasions.

With one exception, however, the foster mother, contradicted this testimony and denied that Mother's overnight visits took place. The foster mother testified that Mother spent one night at her house in June 2003, when Mother slept on the foster mother's living room sofa. The foster mother testified that Mother was not telling the truth when she described 10 overnight visits in the foster mother's house.

The juvenile court was free to disbelieve Mother and to believe the foster mother, and in any case, found no further evidence of Mother's maintenance of regular visitation and contact with Andrew and Prescilla which would constitute a circumstance that provided a compelling reason for determining that termination would be detrimental to those children. At the February 25, 2004, hearing, Mother produced very little evidence regarding her visitation with the children. If, as it is now claimed, the DCFS reports did not reflect visits by Mother to the children, it was Mother's burden to produce such evidence at the February 25, 2004, hearing, so as to meet her burden of establishing the section 366.26, subdivision (c)(1)(A) exception. She did not do so in the juvenile court. On appeal, a parent asserting the subdivision (c)(1)(A) exception must show that substantial evidence does not support the juvenile court's order terminating parental rights. (*In re L. Y. L.* (2002) 101 Cal.App.4th 942, 947.) Mother has not met this burden on appeal.

We find that Mother did not show error in the trial court's findings as to visitation.

(ii) *The Requirement That the Child Would
Benefit From the Relationship*

To satisfy the section 366.26, subdivision (c)(1)(A) exception, a parent must also show that "the child would benefit from continuing the relationship." As to this second requirement, the parent has the burden of showing that continuing the parent-child

relationship will promote the children's well-being to such a degree as to outweigh the well-being the children would gain in a permanent home with new, adoptive parents. (*In re Jamie R.* (2001) 90 Cal.App.4th 766, 773.) The parent must provide proof of a " 'substantial, positive emotional attachment such that the child would be greatly harmed' " if deprived of the parent-child relationship. The parent must provide evidence that the relationship and interaction with the minor had a parental nature, i.e., of a kind which would give the child the sense of security and belonging characteristic of a stable, nurturing, committed family. (*In re Autumn H.*, *supra*, 27 Cal.App.4th at p. 575.) The parent must produce evidence that her relationship with the child involved "the daily nurturing that marks a strong parent-child relationship." (*In re Jamie R.*, *supra*, 90 Cal.App.4th at p. 774.)

The existence of this "beneficial relationship" is determined by the children's ages, the portion of the children's life spent in the parent's custody, the positive or negative effect of interaction between parent and child, and the child's particular needs. (*In re Amber M.* (2002) 103 Cal.App.4th 681, 689.) In this case Prescilla, born June 2000, and Andrew, born August 2001, were detained on November 7, 2001. Thus the children had not lived with Mother since Prescilla was nearly 17 months old and since Andrew was approximately 14 weeks old. Since March 6, 2002, the children had been placed in the home of their foster parents, the prospective adoptive parents. As of the February 25, 2004, hearing, the children had lived nearly two years in the foster parents' home. This was well over half of Prescilla's life and most of Andrew's life. The first two *Amber M.* factors weigh against finding that a beneficial relationship existed that would provide a compelling reason for determining that termination of parental rights would be detrimental to the children.

Mother provided no evidence of the children's particular needs which were met by her beneficial relationship with the children but which the foster parents could not meet. (*In re Angel B.*, *supra*, 97 Cal.App.4th at p. 468.)

Regarding the positive or negative effect of interaction between parent and child, Mother testified that during weekly visits with her at the agency, Prescilla and Andrew were “very caring” with Mother and “playful” with Mother’s third, five-month-old child. Mother testified that on her overnight visits at the foster mother’s house, she fed, played with, and bathed them; slept in the same room with Prescilla; and in the morning combed Prescilla’s hair, washed her face, dressed her, and cared for Prescilla and Andrew. Mother described the children as happy when they saw her, running around and becoming hyperactive. Mother testified that the children referred to her as “Mother” and “Mom.” Mother believed that termination of her parental rights would be detrimental to Prescilla and Andrew because they were attached to Mother and to Mother’s five-month-old daughter. In Mother’s opinion, based on their reactions when they saw Mother or talked to her on the phone, Prescilla and Andrew saw her as a mother. This does not satisfy Mother’s showing as to this *Amber M.* factor. The evidence shows no more than loving contact or pleasant visits, which are not sufficient to meet the burden of proof as to this exception. (*In re L. Y. L.*, *supra*, 101 Cal.App.4th at p. 953.) The evidence does not show that Mother occupied “ ‘a parental role’ ” in relation to the children. (*In re Andrea R.* (1999) 75 Cal.App.4th 1093, 1108.) “Interaction between [a] natural parent and child will always confer some incidental benefit to the child. . . . The exception applies only where the court finds regular visits and contact have continued or developed a significant, positive, emotional attachment from child to parent.” (*In re Autumn H.*, *supra*, 27 Cal.App.4th at p. 575.) Children should not be deprived of an adoptive parent when the previous parent has maintained a relationship that may be beneficial to a degree but which does not meet the children’s need for a parent. (*In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1350.)

Mother has not shown that severing the parent-child relationship would deprive Prescilla and Andrew of a “*substantial*, positive emotional attachment such that the [children] would be *greatly* harmed.” (*In re Angel B.*, *supra*, 97 Cal.App.4th at p. 466,

italics in original.) We conclude that substantial evidence supports the trial court's conclusion that the section 366.26, subdivision (c)(1)(A) exception does not apply.

B. Defective ICWA Notice Requires Remand, With the Nature of Subsequent Proceedings to Depend on the Outcome of Proper ICWA Notice

Mother claims on appeal that the juvenile court and the DCFS had reason to know that Prescilla and Andrew may be Indian children, failed to secure required ICWA notice, and improperly determined Prescilla and Andrew were not Indian children.

In the November 13, 2001, hearing, Efren F.'s counsel informed the juvenile court that the children's maternal grandmother appeared to have Indian ancestry, although she could not identify her tribe. Mother's section 388 petitions filed October 21, 2003, and December 23, 2003, asserted that Prescilla S. might have Indian ancestry. No ICWA notices were sent or ordered to be sent.

The ICWA specifically requires notice to Indian tribes when a court knows or has reason to know that an Indian child² is involved in a dependency case. (25 U.S.C. § 1912(a).) If the tribe's identity cannot be determined, the ICWA requires notice to the Bureau of Indian Affairs. (*Ibid.*; *In re Miguel E.* (2004) 120 Cal.App.4th 521, 549.) The DCFS must satisfy ICWA notice provisions. (*In re Asia L.* (2003) 107 Cal.App.4th 498, 507; 25 U.S.C. § 1912(a).) Notice requirements are strictly construed and apply even if the child's Indian status is uncertain; "[t]he showing required to trigger the statutory notice provision is minimal; it is less than the showing needed to establish a child is an Indian child within the meaning of ICWA." (*In re Miguel E.*, *supra*, at p. 549.) Because the tribe determines a child's Indian status, "the juvenile court needs only a suggestion of Indian ancestry to trigger the notice requirement." (*In re Nikki R.* (2003) 106 Cal.App.4th 844, 848.) "If at any time after the filing of the petition the court knows [of]

² " 'Indian child' means any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe[.]" (25 U.S.C. § 1903(4).)

or has reason to know that the child is or may be an Indian child, the . . . notice procedures must be followed.” (Cal. Rules of Court, rule 1439(f).)

The County of Los Angeles concedes that the juvenile court erroneously failed to order and that the DCFS failed to comply with ICWA notice requirements.

Regarding the remedy to correct defective ICWA notice, the lack of statutory notice requires a limited remand to the juvenile court for the DCFS to comply with ICWA notice requirements, with directions to the juvenile court depending on the outcome of such notice. If, after Indian entities receive proper notice under the ICWA, Prescilla or Andrew is determined not to be an Indian child and the ICWA does not apply, prior defective notice becomes harmless error. (*In re Antoinette S.* (2002) 104 Cal.App.4th 1401, 1413-1414.) In this event, no basis exists to attack prior orders because of failure to comply with the ICWA. Moreover, reversal of the order terminating parental rights on the ground of inadequate ICWA notice would not be in the children’s best interests if they are not Indian children. In that circumstance the juvenile court should reinstate that order and all prior orders. (*In re H. A.* (2002) 103 Cal.App.4th 1206, 1215; *In re Marinna J.* (2001) 90 Cal.App.4th 731, 740.)

Alternatively, after Indian entities receive proper ICWA notice, if Prescilla or Andrew is determined to be an Indian child and the ICWA applies, Mother can then petition the juvenile court to invalidate orders violating 25 United States Code sections 1911, 1912, and 1913. (25 U.S. C. § 1914; Cal. Rules of Court, rule 1439(n)(1).)

DISPOSITION

The juvenile court orders are reversed and the matter is remanded for the DCFS to comply with notice requirements of the ICWA. If, after Indian entities receive proper notice under the ICWA, Andrew F. or Prescilla S. is determined not to be an Indian child and the ICWA does not apply, the juvenile court should reinstate all orders. Alternatively, after Indian entities receive proper notice under the ICWA, if Andrew F. or Prescilla S. is determined to be an Indian child and the ICWA applies to these proceedings, Mother is then entitled to petition the juvenile court to invalidate orders

which violated 25 United States Code sections 1911, 1912, and 1913. (See 25 U.S.C. § 1914 and Cal. Rules of Court, rule 1439(n)(1).)

II. Christopher O.'s Appeal

A. Christopher O.'s Failure to Appeal Prior, Appealable Dependency Court Orders Waives the Issue of Defective Representation by Counsel

Christopher O. claims that after the juvenile court appointed Tim Turner as his attorney on December 5, 2001, Turner did not represent his interests, which denied him meaningful access to the court. Christopher O. concedes that counsel appeared at all later hearings. He complains that, except for advising him to sign a waiver at the jurisdiction/dispositional hearing, the record does not show that counsel ever communicated with Christopher O.

This amounts to a claim that after counsel was appointed on December 5, 2001, the entire dependency proceeding as regards Christopher O. and Prescilla S. was defective because Christopher O. was deprived of his constitutional right to counsel and to the effective assistance of counsel. This claim necessarily calls into question the propriety of orders regarding Prescilla S. made before the section 366.26 hearing. (*In re Meranda P.* (1997) 56 Cal.App.4th 1143, 1150-1151.)

In dependency proceedings, dispositional and following orders are directly appealable pursuant to section 395, except for orders scheduling a selection and implementation hearing under section 366.26. (*In re Meranda P.*, *supra*, 56 Cal.App.4th at p. 1150; *Dwayne P. v. Superior Court* (2002) 103 Cal.App.4th 247, 259.)

Christopher O. did not appeal any order until he filed a notice of appeal from the January 26, 2004, order and a second notice of appeal from the February 25, 2004, order terminating parental rights. The time for filing a notice of appeal from prior orders has passed. As to those orders Christopher O. raises issues involving constitutional rights to counsel and to counsel's effective assistance. Raising these issues, however, creates no exception to the rule "that an appellate court in a dependency proceeding may not inquire

into the merits of a prior final appealable order on an appeal from a later appealable order[.]” (*In re Meranda P.*, *supra*, 56 Cal.App.4th at p. 1151.)

An unappealed disposition³ or post-disposition order is final and binding and may not be attacked in an appeal from a later appealable order. (*In re Jesse W.* (2001) 93 Cal.App.4th 349, 355.) This rule “serves vital policy considerations of promoting finality and reasonable expedition, in a carefully balanced legislative scheme, and preventing late-stage ‘sabotage of the process’ through a parent’s attacks on earlier orders.” (*Ibid.*) It furthermore supports the legislative intention “to expedite dependency cases and subordinate, to the extent consistent with fundamental fairness, the parent’s right of appeal to the interests of the child and the state.” (*In re Meranda P.*, *supra*, 56 Cal.App.4th at p. 1156.) Christopher O. therefore cannot appeal the lack of representation or ineffective assistance of counsel in proceedings before those orders from which his notices of appeal were taken.

B. Christopher O. Lacks Standing to Appeal a Relative Placement Issue

In apparent recognition that his record during the dependency proceeding required termination of his parental rights, Christopher O. claims that his counsel’s lack of representation and ineffective representation caused him to be unable to express his desire for the adoption of Prescilla by Melody O. By this method Christopher O. seeks to raise an issue of relative placement. Christopher O., however, has no standing to appeal a relative placement preference issue. (*Cesar V. v. Superior Court* (2001) 91 Cal.App.4th 1023, 1035.) Melody O. has standing to raise the issue of relative placement preference, not Christopher O. (*Id.* at pp. 1034-1035.)

³ On December 5, 2001, the juvenile court appointed Attorney Turner counsel for Christopher O., ordered a statewide jail removal order for Christopher O., and stated that paternity, jurisdiction, and disposition remained issues for Christopher O. at the January 30, 2002, hearing. Thus as to Christopher O., the January 30, 2002, hearing was the dispositional hearing. (§ 358, subs. (a) & (c).)

C. Section 361.3 Did Not Require the DCFS to Address Relative Placement

Christopher O.'s mother, Melody O., did not make known her desire to be a prospective adoptive parent of Prescilla S. until March 18, 2003. Christopher O.'s dispositional hearing had occurred more than a year earlier, on January 30, 2002. Thus the relative placement preference in section 361.3 did not apply after that date unless "a new placement of the child must be made[.]" (§ 361.3, subd. (d).) No new placement of the children was required after their placement with foster parents as of March 6, 2002. Thus the relative placement statute did not apply as regards Melody O.

When Melody O. came to the attention of the DCFS as a prospective adoptive parent, more than a year after Prescilla's placement with her foster parents, the decision not to attempt placement with Melody O. was reasonable given the lateness of the date on which Melody O. expressed a desire to adopt Prescilla, the stability of Prescilla's placement with the foster parents, and the lack of any relationship between Melody O. and Prescilla. (*Mark N. v. Superior Court* (1998) 60 Cal.App.4th 996, 1009, fn. 5.)

For these reasons, Christopher O.'s appeal lacks merit.

DISPOSITION

In Christopher O.'s appeal, the judgment is affirmed.

In mother Lisa S.'s appeal, the juvenile court orders are reversed and the matter is remanded for the DCFS to comply with ICWA notice requirements. After Indian entities receive proper notice under the ICWA, if Andrew F. or Prescilla S. is determined not to be an Indian child and the ICWA does not apply, the juvenile court should reinstate all previous orders. Alternatively, after Indian entities receive proper notice under the ICWA, if Andrew F. or Prescilla S. is determined to be an Indian child and the ICWA applies to these proceedings, Mother is then entitled to petition the juvenile court to

invalidate orders which violated 25 United States Code sections 1911, 1912, and 1913.
(See 25 U.S.C. § 1914 and Cal. Rules of Court, rule 1439(n)(1).)

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

KITCHING, J.

We concur:

KLEIN, P.J.

CROSKEY, J.